Supreme Court, U. S.
FILED
MAY 26 1976
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1715

JOSEPH LABIT,

Petitioner,

versus

SANTA FE MARINE, INC., and
ARGONAUT INSURANCE COMPANY,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

NO.

JOSEPH LABIT,
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versus

SANTA FE MARINE, INC., and ARGONAUT INSURANCE COMPANY,
Respondents

PETITION FOR A WRIT CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Joseph Labit respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on February 4, 1976, and the denial of the Petition for rehearing entered on March 1, 1976.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Louisiana is unreported. The opinion of the Court of Appeals for the Fifth Circuit is set out in 526 F 2d 961. This opinion is set forth in the appendix hereto as is the order denying the petition for rehearing which is unreported.

The judgment of the Court of Appeals for the Fifth Circuit was entered on February 4, 1976, and the order denying the petition for rehearing was entered on March 1, 1976, and this Petition for a Writ of Certiorari was filed within ninety days of that date.

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

The question presented for review is whether or not the finding by a jury that a plaintiff was 50% contributorily negligent when there was absolutely no evidence showing contributory negligence should be allowed to stand.

STATUTORY PROVISIONS INVOLVED

46 U.S.C. 688, commonly known as the Jones Act.

STATEMENT OF THE CASE

Plaintiff, Joseph Labit, was employed by Santa Fe Marine, Inc., as a roughneck aboard their offshore floating drilling vessel BLUE WATER II. He was a seaman and member of the crew of that vessel and on October 17, 1973, he was injured through the negligence of the defendant, Santa Fe Marine,Inc., its agents and employees and the unseaworthiness of the vessel BLUE WATER II. The accident occurred as the drilling crew was "making a trip", that is, coming out of the hole with all of the pipe to replace the bit. They would take three pieces of pipe out of the hole at one time and rack or stack these strands of pipe in the pipe rack which is a vertical rack inside the superstructure of the drilling unit. On the drilling floor itself there is a receptacle known as a mousehole which is used to hold various tools and instruments at different times. At the time of the accident there was a tool known as a bumper sub lodged in this

mousehole on the drilling floor approximately 40" away from the drilling hole itself. The bumper sub stood approximately 4' above the drilling floor. Plaintiff was a floorhand and had been working a set of tongs. As the pipe came out of the hole, he and his fellow workers broke the connection and the plaintiff and another floor man, Ricky Shelly, were in the process of tying their tongs off so that they would not be able to sway. The other floorhand, Clifton Benoit, was holding the pipe. While they were tying off their tongs, the driller, that is, the pusher of the crew, lifted the pipe out of the hole with only Clifton Benoit holding the pipe. This is a strand of pipe 90' long weighing approximately 3600 pounds. The pipe began to sway since this is on a vessel which naturally rolls and before plaintiff and the rest of the crew could get the pipe under control, plaintiff's arm was caught between the swinging pipe and the tool which was negligently left in the receptacle known as the mousehole. Plaintiff has sued his Jones Act employer, Santa Fe Marine, Inc. At the close of the entire case, the jury brought back a verdict for the plaintiff finding the defendant negligent and further findings that the vessel was not unseaworthy, finding the plaintiff 50% contributorily negligent and fixing the value of plaintiff's injury at $15,000.00.

ARGUMENT

It is certainly established law that once plaintiff has established the negligence of the defendant, the defendant has the burden of proof to establish the contributory negligence of the plaintiff. *Honea v. Matson Navigation Co.*, 336 F. Supp. 793 (1972). In order to meet the burden of establishing contributory negligence on the part of the plaintiff, the defendant must prove that the plaintiff failed to exercise reasonable care and that this failure constituted the proxi-

mate cause of the accident. *Cincotta v. U.S.*, 362 F. Supp. 386.

Plaintiff proved the negligence of the defendant by proving two specific facts:

1) That a bumper sub was left in the mousehole at the time the accident occurred and that this bumper sub should not have been left in the mousehole.

2) That the driller or the pusher of the crew made the mistake when he negligently picked up on the pipe when there was only one man there to tag or restrain the pipe from moving.

Plaintiff proved this through his own testimony and by the testimony of another eye witness, Clifton Benoit, and by the testimony of an expert witness, a mechanical engineer named G. Fred Leibkemann. The direct testimony and the cross examination shows absolutely no basis in fact for the jury finding plaintiff to be contributorily negligent in any amount. More specifically, the witness Clifton Benoit, whose testimony starts on page 142 of Volume IV of the record, explains what they were doing at the time of the accident. He indicates on page 151 that the two tong operators, Labit and Shelly, had to tie their tongs back and he indicates that the driller picked up the pipe before the other hands could get there to help him. He was asked the question (page 153):

> Q Did it seem to you that Mr. Labit had time to move out of the way before the drill collar hit him?
>
> A No.

Cross examination was uneventful and did not even raise the issue of contributory negligence. Plaintiff himself begins to testify on page 164 and he goes through the facts of the accident and verifies what Clifton Benoit said. There was nothing brought out on direct and there was absolutely nothing in the cross examination with regard to contributory negligence or much less on the accident itself. The only other factual witness called by the plaintiff was the expert, G. Fred Leibkemann. He begins testifying on page 207 and his testimony ends on page 276. Direct and cross examination has absolutely nothing to do with the possibility of contributory negligence.

The defendant did not put on any eye witnesses although several were available to him and still employed by Santa Fe Marine,Inc. The only thing close to a factual witness was an expert, John O'Connor, a petroleum engineer. His testimony starts on page 360 of the transcript and his entire testimony was to the effect that it was not negligence for Santa Fe Marine, Inc., to leave the bumper sub in the mousehole. There was absolutely no testimony with regard to any possible contributory negligence. Based on the testimony of Clifton Benoit, the plaintiff Joseph Labit, and the expert, G. Fred Leibkemann, and the expert, John O'Connor who testified on behalf of the defendant, there was not any evidence produced by the defendant or by the plaintiff, either on direct or cross, which in any way insinuates, indicates or suggests that the plaintiff was in any way contributorily negligent. It is submitted that although the contributory negligence of the plaintiff was a finding of fact made by the jury and realizing that the federal judicial system very rarely reverses a finding of fact of the jury, plaintiff feels that this is a case in which there is absolutely no basis in fact or law for the jury to find the plaintiff contributorily negligent

and when such a blatant mistake is made by the jury, this honorable court should reverse that decision.

The Federal Courts have developed a uniform rule with respect to the burden of proof regarding the issue of contributory negligence and it has been definitely established in the federal courts that contributory negligence is an affirmative defense which the defendants must prove by a preponderance of the evidence. See *Railroad Co. v. Gladmon* 1872 15 Wall 401, 21 L ed 114; *Indianapolis & St. Louis RR v. Horst* (1876) 93 US 291; *Hough v. Railway Co.* (1879) 100 US 213, 25 Led 612; *Washington & Georgetown RR v. Harmon,* (1893) 147 US 571, 13 S Ct 557, 37 L ed 284; *Central Vt. Ry. v. White* (1915) 238 US 507, 35 S Ct 865, 59 L ed 1433; *Heminway v. Illinois Cent. RR* (CCA 5th, 1902) 114 Fed 843.

While plaintiff realizes that the trial court's findings cannot be set aside unless clearly erroneous, *DeTore v. Great Atlantic & Pacific Tea Company,* Court of Appeals, 1969, 441 F. 2d 613, the plaintiff feels that this *is* a case where the finding of the jury was clearly erroneous.

The original judgment by the district court, refusal to grant a new trial, the affirmation on appeal to the fifth circuit and the denial for rehearing have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

ST. MARTIN & ELLENDER

BY: TIMOTHY C. ELLENDER
Attorneys for Petitioner
Post Office Box 2868
Houma, Louisiana 70361

CERTIFICATE OF SERVICE

I hereby certify that on this day of May, 1976, I mailed a copy of Petitioner's Writ Certiorari to Respondents' attorney of record by placing said copies in a postpaid envelope addressed to:

Mr. Joseph L. Waitz
WAITZ & DOWNER
Attorneys at Law
Post Office Box 7015
Houma, Louisiana 70361

and depositing said envelope and its contents in the United States mail at Houma, Louisiana.

TIMOTHY C. ELLENDER
Attorney for Petitioner

APPENDIX A

JUDGMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

FILED: Jul 18, 1975
Nelson B. Jones - Clerk

JOSEPH LABIT — CIVIL ACTION
versus — NO. 74-2166
SANTA FE MARINE, INC.,
and ARGONAUT INSURANCE COMPANY — SECTION F

J U D G M E N T

Considering the verdict of the jury,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff, Joseph Labit, in the full and true sum of Fifteen Thousand and No/100 ($15,000.00) Dollars, minus fifty (50%) percent contributory negligence. Judgment is, therefore, rendered in favor of plaintiff, Joseph Labit, in the full and true sum of Seventy-five Hundred and No/100 ($7,500.00) Dollars.

New Orleans, Louisiana, this 17th day of July, 1975.

s/ Lansing L. Mitchell
Judge Lansing L. Mitchell

Date of Entry Jul 22, 1975

APPENDIX B

ORDER DENYING MOTION FOR ORDER REQUIRING PARTY TO PAY EXPENSES FOR REFUSAL TO ADMIT FACTS and MOTION OF PLAINTIFF FOR A NEW TRIAL

JOSEPH LABIT — For plaintiff:
versus — ST. MARTIN & ELLENDER
SANTA FE MARINE, INC., and — Timothy C. Ellender, Esq
ARGONAUT INSURANCE — P.O. Box 2868
COMPANY — Houma, La. 70360 (876-3891)

For defendant: FOR: BOTH DEFTS.
WAITZ, WEIGAND & DOWNER
Joseph J. Weigand, Jr.
409 American Bank Bldg.
Houma, La. 70360

Wednesday, July 23, 1975

10:00 A.M.

Motion of the plaintiff for a new trial.

MOTION ORDERED DENIED.

Motion for order requiring party to pay expenses for refusal to admit facts. MOTION ORDERED DENIED.

APPENDIX C

OPINION OF COURT

Joseph LABIT, Plaintiff-Appellant,
v.
SANTA FE MARINE, INC., et al.,
Defendants-Appellees

No. 75-2988
Summary Calendar.*

United States Court of Appeals, Fifth Circuit

Feb. 4, 1976

In a Jones Act suit, tried before a jury in the United States District Court for the Eastern District of Louisiana at New Orleans, Lansing L. Mitchell, J., plaintiff was found 50% contributorily negligent, and the value of his injury was assessed at $15,000. Plaintiff's timely motion for new trial was denied, and he appealed. The Court of Appeals, Gee, Circuit Judge, held that where an alleged "missing witness" was a relatively subordinate employee and a fellow employee of the plaintiff and where plaintiff had such fellow employee's testimony available in deposition form and the fellow employee was present in the courthouse for the entire trial, having been listed as a witness by the plaintiff, and where plaintiff's attorney was allowed to comment in closing argument on the employer's failure to call such fellow employee, there was no error in refusing to give a requested "missing witness" instruction which did not follow approved form.

Affirmed.

1. Federal Civil Procedure - 2176.2

Where alleged "missing witness" in Jones Act case was relatively subordinate employee and a fellow employee of the

*Rule 18, 5 Cir.; see *Isbell Enterprises, Inc. v. Cicizens Casualty Co. of New York et al.*, 5 Cir. 1970, 431 F.2d 409, Part 1.

plaintiff and where plaintiff had such fellow employee's testimony available in deposition form and fellow employee was present in the courthouse for the entire trial, having been listed as a witness by the plaintiff, and where plaintiff's attorney was allowed to comment in closing argument on employer's failure to call such fellow employee, there was no error in refusing to give requested "missing witness" instruction which did not follow approved form. Jones Act, 46 U.S.C.A. § 688.

2. Federal Civil Procedure - 2173

Propriety of giving a "missing witness" instruction is necessarily matter committed to discretion of trial judge.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before BROWN, Chief Judge, GODBOLD and GEE, Circuit Judges.

GEE, Circuit Judge:

Joseph Labit was injured while working for Santa Fee Marine, Inc. on an offshore floating drilling vessel. In his Jones Act[1] suit, a jury found that Santa Fe Marine was negligent and that Labit was 50% contributorily negligent, and it assessed the value of his injury at $15,000.[2] Labit's timely motion for a new trial was denied, and he now appeals from the judgment of the district court. He assigns as error the following points: (1) the evidence was insufficient to justify the jury's finding of contributory negligence; (2) the district court erred in failing to grant a new trial because of the grossly inadequate size of the jury's award; and (3) the district court erred in failing to give his requested jury instruction with regard to the defendant's non-production of an employee-witness. We have considered the facts and law ap-

1. 46 U.S.C. § 688.

2. The jury also found against Labit on his pendent claim that the vessel was unseaworthy.

plicable to the first two issues and find them to be without merit. Such choices as these represent are normally for the jury, and there was evidence firmly supporting the choices made here. The third complaint is likewise meritless, but we think it appropriate to discuss the relevant facts and law as to it in some detail in order to provide guidelines for future trials.

[1] At trial, Labit requested a form of the "missing witness" instruction.[3] This requested instruction was aimed at the defendant's failure to call Donald R. Northern. Northern worked for Santa Fe Marine as a "driller," and he was in charge of the three-man group in which Labit was working at the time of his injury. Labit took Northern's deposition prior to trial, and Northern was present in the courthouse for the entire trial because he was listed as a witness by the plaintiff. Moreover, Labit's attorney was allowed to comment in closing argument on Santa Fe Marine's failure to call Northern.

Under these circumstances, it was not error to refuse the requested instruction. In this circuit, any inference from a party's failure to call a witness equally available to both parties is impermissible. E.G., *United States v. Chapman*, 435 F.2d 1245 (5th Cir. 1970), *cert. denied*, 402 U.S. 912, 91 S.Ct. 1392, 28 L.Ed.2d 654 (1971). While our cases indicate that "equal availability" in the context of this principle refers to something more than physical accessiblity,[4] they do not require the district court to articulate the reasons for its refusal to permit the inference.[5] Factors showing that

3. The requested charge was:

If a party fails to call a person who possesses knowledge about the facts in question and who is reasonably available to him and who is not equally available to the other party, then you may infer that the testimony of that witness is unfavorable to the party who could have called him and did not.

4. *United States v. Chapman, supra; McClanahan v. United States*, 230 F.2d 919 (5th Cir.), *cert. denied*, 352 U.S. 824, 77 S.Ct. 33, 1 L.Ed. 2d 47 (1956).

5. Compare *East-West Towing Co. v. National Marine Service, Inc.*, 417 F.2d 1273 (5th Cir. 1969) with *Stewart v. United States*, 135 U.S. App. D.C. 274, 418 F.2d 1110, 1114-15 (1969).

Northern was "equally available" in the context of a suit by an injured employee against a mutual employer are Northern's relatively subordinate status,[6] the fact that Northern was physically present at trial,[7] and the fact that plaintiff had Northern's testimony available in deposition form. Furthermore, we note that the requested instruction did not follow the form approved in this circuit, which specifically identifies the potential witnesses to which the inference is appropriate.[8]

[2] The propriety of giving a "missing witness" instruction is necessarily a matter committed to the discretion of the trial judge. See *Burgess v. United States*, 142 U.S. App. D.C. 198, 440 F.2d 226, 234 (1970) (Fahy, J.). Refusal of the instruction in this case was a permissible exercise of that discretion.

Affirmed.

6. We adopt the reasoning of *Felice v. Long Island R.R. Co.*, 426 F.2d 192, 195 n.1 (2d Cir.) (Friendly,J.), *cert. denied*, 400 U.S. 820, 91 S. Ct. 37, 27 L.Ed 2d 47 (1970):

Whatever might be the case in an action by a third party against the employer, we see no factual basis in this day and age for thinking that, in the basence of evidence of personal hostility, a subordinate employee would be more favorable to a corporate employer than to a fellow worker.

If other circuits still hold to the position that the employee-employer relationship automatically makes the employee more available to the employer, see *Illinois Central R.R. Co. v. Staples*, 272 F.2d 829, 833-34 (8th Cir. 1959), we reject their position.

7. See *Burch v. Reading Co.*, 140 F.Supp. 136, 157 (E.D.Pa. 1956), *affirmed*, 240 F.2d 574 (3d Cir. 1957). Of course, this factor is not determinative. See cases cited note 4 *supra*.

8. See *United Broadcasting Co. v. Armes*, 506 F.2d 766, 770 (5th Cir.), *cert. denied*, 421 U.S. 1965, 95 S.Ct. 1953, 44 L.Ed. 2d 452 (1975).

APPENDIX D

ON PETITION FOR REHEARING

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NO. 75 - 2988

U.S.Court of Appeals
FILED MAR 1, 1976
Edward W. Wadsworth - Clerk

JOSEPH LABIT,
Plaintiff-Appellant,

versus

SANTA FE MARINE, INC., ET AL.,
Defendants-Appellees

Appeal from the United States District Court for the Eastern District of Louisiana

ON PETITION FOR REHEARING

(MARCH 1, 1976)

Before BROWN, Chief Judge, GODBOLD and GEE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.